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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 Jason Mathis,

16 Petitioner,

17 v.

18 Nethanjah Breitenbach, Warden,
19 Northern Nevada Correctional Center;
20 James Dzurenda, Director, Nevada
21 Department of Corrections; and Aaron
22 Ford, Nevada Attorney General,

23 Respondents.
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25
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Case No. 3:22-cv-00091-ART-CLB

**First amended petition for a writ
of habeas corpus pursuant to 28
U.S.C. § 2254**

INTRODUCTION

The State accused Mr. Mathis and a co-defendant, Andre Dow, of murdering two individuals as part of an alleged dispute between the San Francisco and Kansas City hip hop communities. At Mr. Mathis's trial, the State introduced into evidence a critical hearsay statement from Mr. Mathis's former romantic partner, Chanel Rowel. According to the State, Mr. Mathis and Ms. Rowel got into a heated argument in San Francisco after the murders took place. The police responded to the argument. When they arrived, Ms. Rowel supposedly told Inspector Robert McMillan that Mr. Mathis had committed a double homicide and was wanted in Las Vegas. According to the State and the trial court, Ms. Rowel's statement was an excited utterance and therefore admissible. The trial court allowed the State to elicit Ms. Rowel's hearsay statement through Inspector McMillan. That hearsay statement suggested Mr. Mathis made incriminating comments to Ms. Rowel about the Las Vegas murders.

Mr. Mathis is entitled to a new trial based on the admission of this hearsay statement. First, admitting the statement created a confrontation clause problem. Second, the trial attorney made ineffective attempts to exclude the statement under the hearsay rules. Third, Mr. Mathis has strong reason to believe there's undisclosed impeachment information regarding Inspector McMillan, who testified about this alleged hearsay statement; the Court should grant Mr. Mathis subpoena power to investigate this issue. For these reasons and others, the Court should grant Mr. Mathis a writ of habeas corpus.

PROCEDURAL HISTORY

I. Someone shoots and kills Anthony "Fat Tone" Watkins and Jermaine "Cocaine Cowboy" Akins.

This case involves a double homicide in the Las Vegas area. According to the prosecution, the saga began in Kansas City, Missouri, when someone shot and killed well known Bay Area hip hop artist Andre "Mac Dre" Hicks in November 2004. Tr.

1 7/24/08 at 146. Mac Dre was in Kansas City for a concert. *Id.* at 147. Someone shot
2 at his car while he and his entourage were driving. *Id.* Mac Dre died in the shooting.
3 *Id.* Rumors began to swirl that the person who killed Mac Dre was Anthony “Fat
4 Tone” Watkins, a hip hop artist from Kansas City. *Id.* at 147-48. The police investi-
5 gated Mr. Watkins as a potential suspect, but they concluded he had a legitimate
6 alibi, and they developed strong evidence against other suspects. *Id.* at 148-49. The
7 police put out a statement clearing Mr. Watkins as a suspect, but rumors nonetheless
8 continued circulating that Mr. Watkins was the culprit. *Id.* at 151-52.

9 Andre “Mac Minister” Dow is a hip hop artist from the Bay Area. Tr. 7/18/08
10 at 15-22. He was a contributing artist on albums released by high-profile hip hop
11 artists like Snoop Dogg. *Id.* at 21-22. As part of his musical career, Mr. Dow was
12 working to start his own record label and develop up-and-coming hip hop artists.
13 Mr. Watkins was one of those artists. *Id.* at 20. Between 2003 and 2005, Mr. Dow
14 was trying to sign Mr. Watkins and was promoting him. *Id.* at 33, 70-72, 85, 168.
15 After Mac Dre’s death, Mr. Dow and Mr. Watkins went to Houston together to meet
16 with various musicians. *Id.* at 37-55; Tr. 7/24/08 at 204-06. On another occasion after
17 Mac Dre’s death, Mr. Dow and Mr. Watkins went to San Francisco together for a
18 week. Tr. 7/18/08 at 88-90; Tr. 7/24/08 at 204-06.

19 In May 2005, Mr. Watkins went to Las Vegas for a Snoop Dogg concert. Tr.
20 7/24/08 at 186. Mr. Watkins believed Mr. Dow was going to introduce him to Snoop
21 Dogg. *Id.* at 68-69, 188-89. Mr. Watkins made the trip along with his friend Jermaine
22 “Cocaine Cowboy” Akins and Mr. Watkins’s girlfriend Kimberly Brown. *Id.* at 187-
23 92. They stayed at the MGM casino. *Id.* The trio spent time in Las Vegas with
24 Mr. Dow. *Id.*

25 On the evening of May 22, 2005, Mr. Dow came to the MGM hotel room to see
26 the trio; he brought along his girlfriend, Tanisha Aaron. Tr. 7/28/08 at 46-47. The
27 five of them left the room together. *Id.*; *see also* Tr. 7/24/08 at 172-79. Ms. Brown

1 and Ms. Aaron split off from the group and went to a club at the Bellagio; Ms. Aaron
2 left Ms. Brown at the club at about 3:00 a.m. Tr. 7/24/08 at 194-96.

3 At about 1:00 a.m. on May 23, 2005, residents of the Southern Highlands area
4 heard gunshots. Tr. 7/23/08 at 134-51. One of the residents called 911. *Id.* at 147-
5 48. Another resident noticed a white Pontiac Sunfire driving away at a high rate of
6 speed with no headlights on; the car failed to stop at a stop sign. *Id.* at 138-39.

7 At about 4:00 a.m., a private security guard was patrolling Southern High-
8 lands. Tr. 7/23/08 at 123-28. The security guard came across the scene of a double
9 homicide. *Id.* Mr. Watkins and Mr. Akins were found shot and killed near a blue
10 Toyota Tercel.

11 The police responded to process the scene. They found an MGM players club
12 card with Mr. Watkins's name on it. Tr. 7/23/08 at 82. They found a cigarette butt
13 and beer can near the crime scene. The police crime lab eventually processed those
14 items for DNA and got DNA reference profiles from Mr. Dow and Mr. Mathis; Mr.
15 Dow and Mr. Mathis were both excluded from the DNA found on these items. Tr.
16 7/24/08 at 137.

17 The police collected multiple bullet casings and bullet fragments from the
18 scene. All the casings were Wolf brand 7.62 x 39 caliber ammunition. Tr. 7/24/08 at
19 260. The ballistics expert concluded the casings were all fired from the same gun,
20 consistent with an AK-47 style gun like a WASR-10. *Id.* at 260-63. The ballistics
21 expert determined the bullet fragments were consistent with two different calibers of
22 bullets: 7.62 x 39 caliber, as well as a nominal .38 caliber. *Id.* The State therefore
23 concluded there were two guns used during the murders.

24 The police found a CD in the Toyota Tercel. Fingerprints on the CD matched
25 Mr. Dow. Tr. 7/25/08 at 91-93. Fingerprints on the exterior of the car matched Ms.
26 Aaron. *Id.*

1 The coroner examined both bodies and concluded the victims died from gunshot
2 wounds. Mr. Watkins was shot mostly from behind. Tr. 7/24/08 at 41-42. Mr. Akins's
3 body contained gunshots that were apparently targeted at his extremities, along with
4 numerous additional unusual wounds; his wounds were consistent with a prolonged
5 killing process and potential torture. Tr. 7/24/08 at 29-31, 38, 46-54, 65.

6 The police received an anonymous call alleging the blue Toyota from the crime
7 scene was associated with a specific address on Zampino Street in Southern High-
8 lands. Tr. 7/28/08 at 47. The police canvassed the area and spoke to a neighbor who
9 lived across the street from the Zampino house. *Id.* at 48. He'd seen Mr. Mathis and
10 Mr. Dow at the house and assumed they were the primary residents. Tr. 7/24/08 at
11 93. He'd noticed Mr. Dow driving the same blue Toyota found at the crime scene. *Id.*
12 at 83-84. He became suspicious in May 2005 when he saw lots of cars coming and
13 going to and from the house, so he began writing down the corresponding license plate
14 numbers, including for a white Pontiac Sunfire. *Id.* at 80-81. He gave the police that
15 plate number. Tr. 7/28/08 at 48. It came back to a woman named Lee Denae Laursen.
16 *Id.* at 48. Ms. Laursen was from Utah and had been living with Mr. Mathis in Las
17 Vegas. Tr. 7/25/08 at 120-22.

18 The police received a search warrant for the Zampino house. They found var-
19 ious firearm paraphernalia, including an assault rifle magazine. Tr. 7/25/08 at 77.
20 Mr. Mathis's fingerprints were on some of the paraphernalia. *Id.* at 87-89. The police
21 also found registration information for the Toyota Tercel in Ms. Aaron's name. Tr.
22 7/28/08 at 54-55. They found a copy of the lease for the house; the lease listed
23 Mr. Mathis as a resident, along with a woman named Desiree Daffron. *Id.* at 55-56.

24 The police ran a check through the Bureau of Alcohol, Tobacco, and Firearms;
25 they received documentation showing Ms. Daffron purchasing a WASR-10 rifle. Tr.
26 7/28/08 at 59-60; *see also* Tr. 11/1/05 at 14-16. After publicizing Mr. Mathis as a per-
27 son of interest in the case, the police received a call from Michael Morrissey, a local

1 gun store owner. Tr. 7/28/08 at 60. According to Mr. Morrissey, Mr. Mathis was a
2 repeat customer at his store. Tr. 7/24/08 at 211. Mr. Mathis had the store put a
3 custom folding stock on the WASR-10. *Id.* at 214. The gun takes 7.62 x 39 caliber
4 ammunition. *Id.* at 217. Mr. Mathis and a woman who wasn't Ms. Daffron came into
5 the store on May 14, 2005, to buy Wolf brand ammunition for the gun; they were
6 driving a white Pontiac Sunfire. *Id.* at 219-28.

7 On May 25, 2005, the police found Ms. Laursen's Pontiac Sunfire burned in
8 Vallejo, California. Tr. 7/24/08 at 97-98. According to the fire department, the fire
9 was probably intentionally set. *Id.* at 101-04.

10 On July 12, 2005, Inspector Robert McMillan responded to a call for service
11 based on an argument between Mr. Mathis and the mother of his child, Chanel Rowel
12 (a/k/a Meka Brown). Tr. 7/28/08 at 10. After he arrived, Ms. Rowel supposedly told
13 Inspector McMillan that Mr. Mathis had killed two people in Las Vegas and the police
14 in Las Vegas were looking for him. *Id.* at 13. The police arrested Mr. Mathis for
15 reasons unrelated to the Las Vegas case. He remained in custody in San Francisco
16 until his extradition to Las Vegas in this case.

17 The San Francisco police conducted a formal interview with Ms. Rowel on July
18 12, and the Las Vegas police conducted a second formal interview with her on July
19 14. 5/18/07 Motion Exhibit C, Exhibit D. She claimed Mr. Mathis spoke to her after
20 the murder and made multiple incriminating statements about his involvement.
21 Ms. Rowel then recanted to a defense investigator and claimed no such conversation
22 ever happened. 1/18/07 Motion Exhibit A; 5/18/07 Motion Exhibit F.

23 On July 14, 2005, the California highway patrol stopped Mr. Dow while he was
24 driving in a rental car. Tr. 7/25/08 at 110-13. Mr. Dow drove away in the middle of
25 the stop, and a chase ensued. *Id.* The police later found the car abandoned in a
26 random driveway. *Id.* at 115-16. The police searched the car and found Ms. Aaron's
27 name on the rental contract. Tr. 7/28/08 at 28. They also found a DVD with a

1 recording of Mr. Dow hanging out with Snoop Dogg at a party. *Id.* at 26-27. Mr. Dow
2 later showed up at the police station to turn himself in on a warrant tied to the chase
3 and bailed himself back out. Tr. 7/25/08 at 116-18.

4 After Mr. Mathis's arrest, Ms. Laursen apparently began associating with
5 Mr. Dow. Tr. 7/25/08 at 123, 130. The grand jury ultimately indicted Mr. Mathis and
6 Mr. Dow in November 2005. 11/2/05 Indictment. At the time, an attorney named
7 Keith Brower was representing Mr. Mathis. Tr. 7/16/08 at 227. Mr. Brower had
8 previously represented Mr. Dow on another case. *Id.* at 228. Mr. Dow had asked
9 Mr. Brower to let him know if he got indicted. *Id.* at 229. Once the indictment issued,
10 Mr. Brower tried calling Mr. Dow unsuccessfully. *Id.* at 230. He eventually tried
11 calling Ms. Laursen instead and got through. *Id.* He said he wanted to talk to
12 Mr. Dow, and she passed the phone over. *Id.* He told Mr. Dow he'd been indicted and
13 advised him to hire another attorney. *Id.* at 230-31.

14 Later that night, Ms. Laursen was found dead, shot in the back of the head in
15 Fairfield, California. Tr. 7/17/08 at 50-57. Also that night, the Richmond, California,
16 police found a burned 2002 Saturn registered to Mr. Mathis. *Id.* at 58, 68-70. The
17 ballistics evidence showed the bullets used in Ms. Laursen's murder were nominal
18 .38 caliber, although the ballistics evidence from those bullets was inconsistent with
19 the ballistics evidence from the .38 bullet jacket fragments found at the Las Vegas
20 crime scene. Tr. 7/16/08 at 88-89; Tr. 7/17/08 at 83.

21 The police had trouble locating and arresting Mr. Dow; he eventually appeared
22 on America's Most Wanted. Tr. 7/17/08 at 111-13. They eventually got a tip on a
23 location. *Id.* The police arrived to the location, and Ms. Aaron opened the door. *Id.*
24 at 118-19. After a couple hours of negotiating, Ms. Aaron let them in. *Id.* at 117-18.
25 They found Mr. Dow hiding under a pile of clothes. *Id.* at 119-20.

26 Mr. Mathis was in the Clark County Detention Center while awaiting trial in
27 this case. A corrections officer from the jail testified he had an argument with

1 Mr. Mathis in October 2005. Mr. Mathis supposedly said he was a gangster and a
2 double murderer. Tr. 7/25/08 at 136-37. Mr. Mathis maintains he said he was “*in*”
3 for a double *murder*, not that he *was* a double *murderer*. *Id.* at 139; see 2/3/12 Petition
4 Exhibit 2; PEx. 2.

5 In July 2007, an inmate named Barbara Carpenter approached the police. She
6 claimed she was able to speak with Mr. Mathis through vents in the jail. Tr. 7/25/08
7 at 22-23. Mr. Mathis had written hip hop songs while in jail and performed some of
8 the songs for her. The prosecution thought some of the lyrics were incriminating. *Id.*
9 at 26-28. Ms. Carpenter claimed Mr. Mathis confessed to killing two people. *Id.* at
10 31-32. According to her, Mr. Mathis said the killing was in retaliation for Mac Dre’s
11 death. *Id.* at 31-37. He supposedly threatened her if she told the police what he said.
12 *Id.* at 26-28, 38.

13 Based on Ms. Carpenter’s statement, the police received a warrant to search
14 Mr. Mathis’s cell for papers containing incriminating statements. Tr. 7/28/08 at 99;
15 see also 1/4/08 Motion to Suppress. The police seized papers containing rap lyrics,
16 including but not limited to lyrics that matched the lyrics Ms. Carpenter quoted. *Id.*
17 at 100. At trial, the detective quoted from multiple rap lyrics at length. *Id.* at 100-
18 04, 136.

19 **II. The State prosecutes Mr. Dow and Mr. Mathis for the Las Vegas** 20 **murders.**

21 The prosecution brought the case to a grand jury. Tr. 10/25/05; Tr. 11/1/05.
22 The grand jury issued an indictment charging Mr. Dow and Mr. Mathis with murder.
23 11/2/05 Indictment.

24 Mr. Mathis filed a severance motion. 5/18/07 Motion; see also 2/6/08 Motion;
25 5/19/08 Brief; 5/27/08 Briefs. The court ordered Mr. Mathis and Mr. Dow’s trials sev-
26 ered because evidence regarding Ms. Laursen’s murder was admissible as to Mr. Dow
27 but not as to Mr. Mathis. Tr. 5/29/08 at 3.

1 Mr. Dow's trial proceeded first. He presented an alibi defense, with two wit-
2 nesses testifying he was at the parking lot of a local radio station hanging out with a
3 DJ and other individuals from San Francisco at the time of the crime. Tr. 7/18/08 at
4 104-07, 129-32. The jury found Mr. Dow guilty of two counts of first-degree murder
5 and two counts of conspiracy to commit murder. 7/21/08 Verdict (Liability). The case
6 proceeded to a non-capital penalty phase. Mr. Dow was willing to waive jury sentenc-
7 ing, but the prosecution refused. Tr. 7/21/08 at 22. The jury imposed life without
8 parole. 7/21/08 Verdict (Penalty).

9 Mr. Mathis's trial proceeded immediately after Mr. Dow's. The jury found him
10 guilty of two counts of first-degree murder and two counts of conspiracy to commit
11 murder. 7/29/08 Verdict (Liability). The case proceeded to a non-capital penalty
12 phase. Mr. Mathis was willing to waive jury sentencing, but the prosecution again
13 refused. Tr. 7/30/08 at 4-10. The jury imposed life without parole. 7/30/08 Verdict
14 (Penalty); *see also* 10/8/08 Judgment.

15 Mr. Mathis appealed. *See* 4/22/10 Opening Brief; 6/24/10 Answering Brief. The
16 Nevada Supreme Court affirmed. 6/30/11 Order; *see also* 7/25/11 Remittitur.

17 Mr. Mathis filed a pro se state post-conviction petition. 2/3/12 Petition. The
18 state district court denied the petition without appointing counsel. 5/14/12 Notice of
19 Entry. Mr. Mathis appealed. In the interim, the district court reconsidered its deci-
20 sion and decided to appoint an attorney for Mr. Mathis. *See* 1/24/13 Request. The
21 Nevada Supreme Court remanded the case. 4/10/13 Order.

22 The newly appointed state post-conviction attorney filed a counseled supple-
23 mental petition. 10/30/14 Petition. The state district court conducted an evidentiary
24 hearing. Tr. 1/24/19; Tr. 4/23/19. The court denied the petition. 7/11/19 Notice of
25 Entry. Mr. Mathis appealed. *See* 1/3/20 Opening Brief; 1/30/20 Answering Brief;
26 3/16/20 Reply Brief. The Nevada Supreme Court affirmed. 11/13/20 Order; *see also*
27 12/8/20 Remittitur.

1 Mr. Mathis filed a case-initiating document in this Court on or about February
2 8, 2022. ECF No. 5. He then filed a federal habeas petition on or about July 7, 2022.
3 ECF No. 6. The Court appointed the Federal Public Defender, District of Nevada, to
4 represent Mr. Mathis. ECF No. 11. It authorized counsel to file this first amended
5 petition. ECF No. 15.

6 **STATEMENT REGARDING 28 U.S.C. § 2254(d)**

7 For each ground for relief in this petition, Mr. Mathis alleges any rulings from
8 the Nevada appellate courts denying him relief on the merits are (or would be) (1)
9 contrary to, and/or an unreasonable application of, clearly established Federal law,
10 as determined by the Supreme Court of the United States; and/or (2) based on an
11 unreasonable determination of the facts in light of the evidence presented in the State
12 court proceeding.

13 Mr. Mathis also asserts for the purposes of further review that the standard of
14 review in 28 U.S.C. § 2254(d) violates the U.S. Constitution, specifically the Suspen-
15 sion Clause (Article One, Section Nine, clause two); fundamental principles of sepa-
16 ration of powers (Articles One, Two, Three); the ban on cruel and unusual punish-
17 ments (Amendments Eight and Fourteen); and the guarantee of due process (Amend-
18 ments Five and Fourteen). *But see Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007)
19 (rejecting some of these arguments).

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GROUNDS FOR RELIEF

Ground One: The trial court allowed testimony about a declarant's out-of-court testimonial statement, violating Mr. Mathis's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Statement regarding exhaustion: Mr. Mathis litigated this claim or a substantially similar claim in his direct appeal.

Statement in support of claim:

At trial, the court allowed the prosecution to elicit evidence from San Francisco Police Department Inspector Robert McMillan about a statement made by Chanel Rowel (Mr. Mathis's former romantic partner). According to Inspector McMillan, Ms. Rowel told him Mr. Mathis had killed two people in Las Vegas. That testimony (and other related testimony) suggested Mr. Mathis made incriminating statements to Ms. Rowel. The admission of this testimonial statement violated Mr. Mathis's confrontation clause rights. *See Crawford v. Washington*, 541 U.S. 36 (2004). Mr. Mathis is therefore entitled to a new trial.

This claim involves an incident in the San Francisco area on July 12, 2005. According to a police report written by Officer Brett Bodisco, the police responded to a disturbance involving Ms. Rowel, Mr. Mathis, and Ms. Laursen. 10/30/14 Supplemental Petition at 767. After the police calmed everyone down, Officer Bodisco spoke to Ms. Rowel. *Id.* She said Mr. Mathis was upset with her because they'd had an argument two days earlier about their two-year-old child. *Id.* On July 12, Mr. Mathis and Ms. Laursen drove by and pulled up to Ms. Rowel while she was walking home. *Id.* Ms. Rowel ran away, but Mr. Mathis caught up to her and pinned her up against her back door. *Id.* Her phone rang; Mr. Mathis snatched it out of her hand and threw it away. *Id.* Ms. Rowel's brother came out and separated the pair. *Id.* Ms. Rowel wanted Mr. Mathis arrested, so she went back to their car and tried to take the car keys away so Mr. Mathis couldn't leave. *Id.* Ms. Laursen was still in the car, and

1 she pepper-sprayed Ms. Rowel. *Id.* Ms. Rowel began to stumble around, and
2 Mr. Mathis grabbed her and pulled her by her hair until her brother was able to sep-
3 arate them again. *Id.* The police arrived shortly after. *Id.* Officer Bodisco also spoke
4 to Ms. Rowel's brother, who "reiterated the same as Rowel." *Id.* Nowhere in this
5 report does it memorialize Ms. Rowel saying Mr. Mathis either threatened to kill
6 Ms. Rowel or referenced the Las Vegas double homicide during the disturbance. In-
7 deed, the report fails to check a box for any "spontaneous statements" that Ms. Rowel
8 might've made at the scene. *Id.* at 769.

9 The police realized Mr. Mathis had a warrant for his arrest for another charge,
10 so they arrested him on that warrant. 10/30/14 Supplemental Petition at 767. They
11 also booked him for a domestic violence charge against Ms. Rowel and a driving in-
12 fraction. *Id.* at 767-68. The police found cannabis in the car. *Id.* at 768.

13 Inspector Robert McMillan responded to the scene of the disturbance on July
14 12, 2005. 10/30/14 Supplemental Petition at 767. That same day, he conducted an
15 interview with Ms. Rowel regarding the Las Vegas double homicide. 5/18/07 Motion
16 Exhibit C. (Inspector McMillan prepared also prepared a summary report regarding
17 the interview. PEx. 1.) According to Ms. Rowel, Mr. Mathis spoke to her after the
18 double homicide took place and made detailed incriminating statements about his
19 and Mr. Dow's involvement in the crime. The admissions Mr. Mathis allegedly made
20 to Ms. Rowel were consistent with the prosecution's theory of the case. Nowhere in
21 this interview does Ms. Rowel say Mr. Mathis either threatened to kill Ms. Rowel or
22 referenced the Las Vegas double homicide during the July 12 disturbance.

23 Las Vegas detectives travelled to San Francisco to conduct a second interview
24 with Ms. Rowel on July 14, 2005. 5/18/07 Motion Exhibit D. Ms. Rowel again claimed
25 Mr. Mathis made incriminating statements to her about the crime. She also claimed
26 Mr. Mathis made comments during the July 12 incident that were threatening to-
27 ward Ms. Rowel and that referenced the Las Vegas case. *Id.* at 13. This statement

1 appears to be the first documented occasion where Ms. Rowel alleged Mr. Mathis
2 made a threatening statement to her on July 12 involving the Las Vegas case.

3 The domestic violence case proceeded to a preliminary hearing in San Fran-
4 cisco on July 27, 2005. The prosecution called Officer Robert Yick and Officer Brett
5 Bodisco to testify about their conversations with Ms. Rowel and her brother. The
6 defense called Ms. Rowel to testify. She said that when Mr. Mathis showed up at her
7 residence, she was angry because Mr. Mathis had brought his new girlfriend
8 Ms. Laursen along instead of coming by himself. 10/30/14 Supplemental Petition at
9 1355. She started arguing with Ms. Laursen and tried to take the car keys, at which
10 point Ms. Laursen pepper sprayed her. *Id.* She testified Mr. Mathis didn't hit or
11 injure her. *Id.* at 1358. She lied to the police about Mr. Mathis hitting and threat-
12 ening her; she'd made those false statements out of revenge. *Id.* at 1360-62. The
13 defense also called Ms. Laursen to testify; her testimony was consistent with
14 Ms. Rowel's. *Id.* at 1368-74.

15 After Ms. Laursen's murder, a detective from the relevant California jurisdic-
16 tion contacted Inspector McMillan. 6/16/08 Motion Exhibit A. Inspector McMillan
17 told the detective about the July 12 incident. Nowhere in the report does it appear
18 Inspector McMillan claimed Ms. Rowel made a spontaneous statement at the scene
19 of the incident that involved the Las Vegas case.

20 Mr. Mathis's attorney assigned an investigator to speak to Ms. Rowel ahead of
21 trial. Ms. Rowel signed an affidavit for the investigator on July 4, 2006. 5/18/07
22 Motion Exhibit F. Her affidavit describes the incident on July 12, 2005, and is con-
23 sistent with her testimony at the preliminary hearing. According to the affidavit,
24 once the police arrived at the scene, she told them Mr. Mathis was wanted for murder
25 in Las Vegas, and she said there were news articles online about the case. She then
26 gave details about the case to the police. Those details were from her own internet
27 research; Mr. Mathis never confessed anything to her. The investigator also recorded

1 his corresponding conversation with Ms. Rowel and prepared a transcript of the con-
2 versation, which is consistent with the affidavit. 1/18/07 Motion Exhibit A.

3 Leading up to trial, the parties made multiple efforts to secure Ms. Rowel's
4 attendance. The State filed pleadings in 2006 suggesting they were having difficulty
5 serving her with subpoenas. 2/7/06 Request; 8/16/06 Request. The defense filed a
6 motion in early 2007 suggesting the court authorize the parties to take her deposition
7 in advance of trial to prevent any issues securing her appearance. 1/18/07 Motion.
8 The State opposed the motion. 2/2/07 Opposition; *see also* 2/8/07 Reply; 2/9/07 Sup-
9 plemental Reply. At a status check, the prosecution said that if Ms. Rowel didn't
10 appear for trial, then none of her statements would be admissible. Tr. 2/12/07 at 4-5.
11 On that basis, the court declined to authorize a deposition. *Id.* at 5. At a later status
12 check, the prosecution changed its mind and suggested it would be appropriate to
13 depose Ms. Rowel. Tr. 7/17/07 at 7-8; *see also* Tr. 7/10/07 at 16-19. The prosecution
14 again reiterated Ms. Rowel's statements would be inadmissible unless she appeared
15 at trial (or was deposed). Tr. 7/10/07 at 16-19.

16 The court conducted another status check. The prosecution said Ms. Rowel
17 had reached out again to San Francisco investigators and was now claiming she was
18 threatened into recanting; at this point, she was avoiding service. Tr. 8/14/07 at 9.
19 The parties again discussed a potential deposition or material witness warrant; they
20 appeared to agree Ms. Rowel's statements would be inadmissible if she failed to ap-
21 pear for trial (or a deposition). *Id.* at 24-27.

22 At another status check, the prosecution said the San Francisco authorities
23 had arrested Ms. Rowel on a material witness warrant, but the San Francisco court
24 ordered her released. Tr. 2/8/08 at 68-69.

25 During Mr. Dow's trial, the prosecution called Inspector McMillan in part to
26 discuss the July 12, 2005, incident. The prosecution asked whether Ms. Rowel said
27 something to Inspector McMillan when he arrived. Tr. 7/17/08 at 107. The defense

1 raised a hearsay objection. *Id.* The court concluded the statement was admissible as
2 an excited utterance and overruled the objection. *Id.* Inspector McMillan said
3 Ms. Rowel told him “you need to arrest [Mr. Mathis] because he killed two people in
4 Las Vegas and they’re looking for him down there.” *Id.* at 107-08.

5 After that testimony, Mr. Mathis filed a motion in limine to exclude this state-
6 ment from his trial. 7/21/08 Motion. The motion cited *Crawford*. *Id.* at 4, 6 & n. 1.
7 The State opposed the motion. 7/22/08 Response.

8 At the start of Mr. Mathis’s trial, the parties made a record about the issue.
9 The prosecution and the court suggested Ms. Rowel would willingly appear at trial at
10 Mr. Mathis’s request but was otherwise refusing to cooperate with the State. Tr.
11 7/23/08 at 7. Thus, in the court’s view, there was no confrontation problem. *Id.* The
12 defense attorney disputed the notion that either he or Mr. Mathis was in contact with
13 Ms. Rowel. *Id.* at 7-8. The defense objected under *Crawford*. *Id.* at 8. (According to
14 the transcript, the attorney said, “It violates proffer”; in context, the attorney is obvi-
15 ously saying the phonetically similar term *Crawford*, not “proffer.”) The parties then
16 argued at length about whether Ms. Rowel’s statement to Inspector McMillan (about
17 Mr. Mathis killing two people in Las Vegas) was admissible under the hearsay rules.
18 *Id.* at 8-14; *see also id.* at 37-39. The court deferred decision. *Id.* at 13-14.

19 The parties continued to discuss this issue at length during the next trial day;
20 the court ruled the statement was admissible. Tr. 7/24/08 at 114-27. The defense
21 again referenced *Crawford*. *Id.* at 116.

22 Inspector McMillan testified at Mr. Mathis’s trial. He said he responded to the
23 scene of the disturbance on July 12, 2005, and saw Mr. Mathis and Ms. Rowel argu-
24 ing. Tr. 7/28/08 at 11-13. When Inspector McMillan arrived, Ms. Rowel said to him,
25 “he killed two people in Las Vegas they’re looking for him down there.” *Id.* at 13. The
26 court overruled the defense’s hearsay objection. *Id.* The prosecutor asked whether
27 Inspector McMillan eventually took “a tape recorded statement from her”; he said he

1 did. *Id.* at 14. The defense objected; the court sustained the objection and told the
2 prosecution not to go there; the defense requested a mistrial. *Id.* The prosecutor
3 asked if Las Vegas homicide detectives came to San Francisco; the defense requested
4 a sidebar; and after a bench conference the prosecutor moved on to discuss Mr. Dow's
5 flight from the traffic stop (which took place when the Las Vegas homicide detectives
6 were in San Francisco). *Id.* at 14-15.

7 Later that same day at trial, the prosecutor asked a Las Vegas detective
8 whether Ms. Rowel gave the police non-public information about the crime. Tr.
9 7/28/08 at 72-73. The defense objected, and the court overruled the objection. *Id.*
10 The detective said she did. *Id.*

11 During the state post-conviction proceedings, the defense called Ms. Rowel to
12 testify at an evidentiary hearing. She described the July 12, 2005, incident; her tes-
13 timony was generally consistent with her San Francisco preliminary hearing testi-
14 mony. Tr. 1/24/19 at 9-16. She said she told the police Mr. Mathis was wanted for
15 murder in Las Vegas because she felt betrayed that Mr. Mathis was dating someone
16 else and she wanted Mr. Mathis to be arrested. *Id.* at 15-16. There was much about
17 the case she didn't recall, but she maintained that when she told the police Mr.
18 Mathis made incriminating statements to her, that was a lie. *Id.* at 31-48, 53-54.

19 Inspector McMillan's testimony about Ms. Rowel's hearsay statement—that
20 Mr. Mathis had killed two people in Las Vegas—was inadmissible under the confron-
21 tation clause. The statement was testimonial. Ms. Rowel wasn't making this state-
22 ment in an emergency or for the purpose of receiving aid—rather, she made the state-
23 ment to Inspector McMillan out of spite, for the express purpose of retaliating against
24 Mr. Mathis and getting him arrested for the murder charge. *See, e.g.*, 6/16/08 Motion
25 Exhibit A (Inspector McMillan informs a Las Vegas detective that Ms. Rowel told
26 Inspector McMillan “that Mathis had told her of his involvement in the double hom-
27 icide in Las Vegas. Being upset with Mathis, [Ms. Rowel] advised this information to

1 Inspector McMillan and Mathis was subsequently arrested”). Because this statement
2 was testimonial—it was explicitly designed to incriminate Mr. Mathis and lead to his
3 arrest—the confrontation clause forbade its admission into evidence unless
4 Ms. Rowel was present at trial for cross-examination. The trial court therefore vio-
5 lated Mr. Mathis’s confrontation clause rights by admitting this statement. The error
6 had a substantial and injurious effect on the verdict. Mr. Mathis is entitled to a new
7 trial.

8 **Ground Two: The State seized attorney-client privileged mate-**
9 **rials from Mr. Mathis’s jail cell, violating Mr. Mathis’s rights un-**
10 **der the Fifth, Sixth, and Fourteenth Amendments to the United**
11 **States Constitution.**

12 **Statement regarding exhaustion:** Mr. Mathis litigated this claim or a sub-
stantially similar claim in his direct appeal.

13 **Statement in support of claim:**

14 The police secured a search warrant to search Mr. Mathis’s cell for potentially
15 incriminating handwritten statements. The lead detective seized a wide variety of
16 handwritten materials containing at least one arguably attorney-client privileged
17 document. The lead detective personally reviewed the materials for relevance. This
18 process violated Mr. Mathis’s Sixth Amendment rights. Mr. Mathis is therefore en-
19 titled to a new trial.

20 The detective sought the warrant on August 1, 2007. 1/4/08 Motion Exhibit A.
21 The warrant application sought “writings/letters of inmate Jason Mathis” from his
22 “cell” or his “personal belongings” (i.e., a box of personal belongings stored at the
23 prison outside Mr. Mathis’s cell). *Id.* at 1 (cleaned up). For unclear reasons, the police
24 had previously sought a search warrant for Mr. Mathis’s outgoing mail from the jail.
25 *Id.* at 2. Pursuant to that warrant, the police copied letters sent by Mr. Mathis to
26 another jail inmate, Barbara Carpenter. *Id.* One letter references Mac Dre, along
27 with another murdered Bay Area rapper Tupac Shakur, and states they “left it to me

1 I'm handling business." *Id.* (cleaned up). The police thought that statement was
2 consistent with their theory of motive, i.e., that Mr. Watkins was killed in retaliation
3 for Mr. Watkins murdering Mac Dre. *Id.*

4 According to the warrant application, the police interviewed Ms. Carpenter at
5 the jail on July 19, 2007. Ms. Carpenter said she'd received letters from Mr. Mathis
6 and had spoken to Mr. Mathis through a vent in between their jail cells. 1/4/08 Mo-
7 tion Exhibit A at 2. Ms. Carpenter said Mr. Mathis admitted to killing two people.
8 *Id.* at 3. He also performed for Ms. Carpenter a hip hop song he wrote. *Id.* The lyrics
9 referenced "a boy behind a building with a hole in his chest and he won't say them
10 things again." *Id.* The police apparently thought that statement was relevant to the
11 double homicide. *Id.* In turn, the police concluded Mr. Mathis might "possess written
12 rap lyrics and/or other writings which may implicate him in the murders." *Id.* The
13 application therefore sought a warrant "to seize any writings/letters written by Jason
14 Mathis from his cell/personnel belongings at CCDC which may be related to this
15 case." *Id.*

16 The lead detective received the warrant on August 1, 2007, and executed it the
17 same day with assistance from a correctional officer. Tr. 2/8/08 at 31. According to
18 the detective, he set aside certain papers that appeared to be potentially attorney-
19 client privileged; he "looked at" those documents "long enough to see what they were"
20 but "did not read them." *Id.* at 32. The detective seized a host of additional papers—
21 there were so many papers that the detective was unable to review them all for rele-
22 vance while the detective was in the cell. *Id.* The detective took additional papers
23 from Mr. Mathis's property box at the jail. *Id.* at 33. The detective then reviewed the
24 papers for relevance and sorted them into relevant and irrelevant piles. *Id.* The
25 detective gave the prosecutor a copy of the documents in the relevant pile and im-
26 pounded the irrelevant pile. *Id.* at 34-35.

1 The defense filed a motion to suppress the documents. 1/4/08 Motion. The
2 motion argued in part that the warrant impermissibly authorized the seizure of at-
3 torney-client privileged information. The defense separately filed a motion to dismiss
4 the case for Sixth Amendment violations. 1/11/08 Motion. The motion again argued
5 the police seized potentially attorney-client privileged materials. It attached a docu-
6 ment that the defense maintained was privileged. *Id.* Exhibit A. And the defense
7 separately filed a motion challenging the prosecution's refusal to return original cop-
8 ies of the seized privileged documents. 1/31/08 Motion.

9 The State opposed all three motions. It appeared to dispute whether the rele-
10 vant document was privileged. 2/4/08 Opposition at 7. The defense filed a reply
11 maintaining that document was privileged and explaining the police seized additional
12 privileged documents. 2/7/08 Reply.

13 The court held a hearing on the motions. Tr. 2/8/08. The lead detective testi-
14 fied about the search process. The court provisionally denied the motions but stated
15 it would review the seized documents from the irrelevant pile for additional poten-
16 tially privileged materials. *Id.* at 63-64, 71. The court then reviewed those docu-
17 ments; it looked at all the documents but didn't read everything in detail. Tr. 2/13/08
18 at 3. The court concluded there were no privileged documents in that pile. *Id.* The
19 court marked the box of supposedly irrelevant documents as a court exhibit. *Id.* at 5.

20 The execution of the warrant violated Mr. Mathis's Sixth Amendment rights.
21 The lead detective in this case personally seized large amounts of papers from
22 Mr. Mathis's cell under the theory Mr. Mathis might've written something incrimi-
23 nating. The detective proceeded to personally review those papers for relevance and
24 potential privilege. The police and the prosecution failed to utilize a filter team to
25 review the documents—instead, the lead detective conducted the entire review by
26 himself. At least one of the documents was arguably privileged. The Sixth Amend-
27 ment cannot tolerate a lead detective seizing handwritten materials—including

1 potentially privileged materials—from a defendant’s cell and then personally review-
 2 ing those materials for relevance and privilege. This Sixth Amendment error is struc-
 3 tural, and in the alternative it had a substantial and injurious effect on the verdict.
 4 Mr. Mathis is entitled to a new trial.

5 **Ground Three: Mr. Mathis’s attorney provided ineffective assis-**
 6 **tance at the liability phase of the trial, violating Mr. Mathis’s**
 7 **rights under the Fifth, Sixth, and Fourteenth Amendments to**
 8 **the United States Constitution.**

9 **Statement regarding exhaustion:** Mr. Mathis litigated this claim or a sub-
 10 stantially similar claim in his state post-conviction proceedings.

11 **Statement in support of claim:**

12 A criminal defendant has the right to effective assistance of counsel during
 13 trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Here, Mr. Mathis’s trial
 14 attorney provided deficient performance during the liability phase of the trial in at
 15 least two different respects. Those two errors were prejudicial, both individually and
 16 cumulatively. Mr. Mathis is therefore entitled to a new trial.

17 **A. The attorney failed to make appropriate objections to**
 18 **Ms. Rowel’s hearsay statement.**

19 As Ground One explains in detail, the prosecution elicited evidence at trial that
 20 Ms. Rowel told Inspector McMillan that Mr. Mathis had committed two murders in
 21 Las Vegas. Another detective testified Ms. Rowel then spoke to the police and pro-
 22 vided the police with non-public information about the crimes. The jury was therefore
 23 led to infer that Mr. Mathis admitted to Ms. Rowel that he committed the double
 24 homicide and provided Ms. Rowel with non-public information about the crime that
 25 only he could’ve known.

26 Mr. Mathis’s attorney argued Inspector McMillan’s testimony about
 27 Ms. Rowel’s statement was inadmissible under the hearsay rules. But the attorney
 provided a disjointed and confused argument regarding hearsay. The attorney’s

1 argument confused two hearsay rules—the prosecution and the court were focused
2 on the excited utterance exception, but the attorney’s argument incorrectly focused
3 on the present sense impression exception. As a result, the attorney made an unper-
4 suasive argument for exclusion. The error amounted to ineffective assistance.

5 Nevada has an exception to the hearsay rule for present sense impressions.
6 NRS 51.075. “A statement describing or explaining an event or condition made while
7 the declarant was perceiving the event or condition, or immediately thereafter, is not
8 inadmissible under the hearsay rule.” *Id.* Nevada also has an exception to the hear-
9 say rule for excited utterances. NRS 51.095. “A statement relating to a startling
10 event or condition made while the declarant was under the stress of excitement
11 caused by the event or condition is not inadmissible under the hearsay rule.” *Id.*

12 The attorney’s argument confused the two exceptions. The attorney filed a
13 motion in limine to exclude this testimony. 7/21/08 Motion. The motion argued pri-
14 marily that the statement couldn’t be an excited utterance because an excited utter-
15 ance needs to be about the event that causes the excitement. Likewise, during the
16 court proceedings, the attorney began by saying Ms. Rowel’s statement wasn’t “an
17 excited utterance because you have to be observing the actual event and commenting
18 on the event . . . during the period of excitement.” Tr. 7/23/08 at 8.

19 Those arguments were off base. That rule—a declarant must be observing and
20 commenting on the actual event—covers present sense impressions, not excited ut-
21 terances. The attorney therefore confused the rules.

22 The attorney continued to argue the issue at trial and provided a hypothetical
23 involving a declarant who watches a car run a red light and then makes comments
24 about the car as the declarant is “observing this particular incident.” Tr. 7/23/08 at
25 10. Again, that involves a present sense impression, not an excited utterance. The
26 court tried to correct the attorney—it said the statement merely had to “relate[] to
27

1 the startling event”—but the attorney said the statement had to be made “[w]hile
2 observing the event,” which again mixes up the rules. *Id.* at 11.

3 The prosecutor explained the defense was “talking about the statement having
4 to occur while the thing is being observed,” which the court agreed was “present sense
5 impression.” Tr. 7/23/08 at 11. The court explained, “We’re talking about an excited
6 utterance that present sense impression does not have to occur.” *Id.* at 11-12. The
7 defense attorney expressed confusion: “oh, it’s under the excitement -- . . . While
8 you’re excited -- . . . Under the excitement of the condition that caused your excite-
9 ment.” *Id.* at 12. The court invited the parties to submit further case law on the
10 issue. *Id.* at 13.

11 The parties continued discussing the issue the next day. The court again sug-
12 gested the defense attorney was mixing up present sense impression and excited ut-
13 terance. Tr. 7/24/08 at 117. Eventually, the court remarked in a related context, “I’m
14 not going to teach you the rules of evidence.” *Id.* at 122.

15 The attorney provided deficient performance during the argument regarding
16 the admissibility of Inspector McMillan’s testimony regarding Ms. Rowel’s alleged
17 statement. The attorney focused his argument, incorrectly, on the present sense im-
18 pression, when the prosecution was seeking to admit the statement under the excited
19 utterance exception. The court had to correct the attorney repeatedly. The attorney’s
20 arguments fell below reasonable professional standards.

21 The error was prejudicial. Had the attorney had made a legally appropriate
22 argument against admitting the statement under the excited utterance exception,
23 and had the court responded to the argument reasonably, the court would’ve excluded
24 the statement. In turn, there’s a reasonable probability the jury would’ve returned a
25 more favorable verdict had this damaging statement not come into evidence.
26 Mr. Mathis is therefore entitled to a new trial.
27

B. The attorney failed to object to inadmissible and prejudicial rap lyrics.

As Ground Two explains in detail, the police seized multiple handwritten documents from Mr. Mathis's jail cell. Those handwritten documents included rap lyrics Mr. Mathis had written while in custody. The trial court repeatedly suggested the rap lyrics were irrelevant and therefore inadmissible. But the defense attorney provided substandard efforts to ensure they were excluded. The error amounted to ineffective assistance.

The attorney filed a motion in limine that referenced these lyrics (among other evidence). 1/4/08 Motion. The attorney also filed a motion to preclude the State from calling an expert witness to discuss hip hop culture. 1/29/08 Motion. It appears the court never expressly ruled on either motion.

At a hearing that occurred soon after the attorney filed the motions, the court stated, "I have a hard time finding the relevance with . . . these lyrics, and I don't know . . . whether they mean something that has to do with this case." Tr. 2/8/08 at 38. Later, the court said, "I think the State has some relevance hurdles on some of this stuff . . . I'm not saying anything's admissible." *Id.* at 49. At the end of the hearing, the court said it would resolve the motion in limine at the next court date (February 13, 2008). *Id.* at 245. It doesn't appear the court explicitly ruled on the request to exclude the rap lyrics on that date (or subsequently).

At another status check, the attorney referenced the lyrics; the court said, "They're just crap. They're just crap." Tr. 3/21/08 at 30. It ruled that certain letters Mr. Mathis wrote to Ms. Carpenter were admissible, potentially including letters Mr. Mathis sent to Ms. Carpenter containing rap lyrics. *Id.* at 30-31. But "if it's just [a] general song that has nothing to do with Ms. Carpenter, I don't know that it has any materiality." *Id.* at 30. Again, it appears the court never expressly ruled the other rap lyrics were either admissible or inadmissible.

1 At trial, the prosecution elicited extensive evidence about the lyrics without
2 any defense objection, including multiple sets of lyrics with no relevance to Ms. Car-
3 penter. The lyrics were:

- 4 • “I’m the boogiemán. I’ve got the streets terrified. They panickin’ every
5 time they slide through they say, momma there go that man again, they
6 found the boy behind the building -- building stiff like a manikin. The
7 boy was sending threats I bet he won’t say them things again.” Tr.
8 7/28/08 at 101.
- 9 • “Jill my life is real. If I get convicted for the crime when I get back on
10 appeal.” Tr. 7/28/08 at 101.
- 11 • “You lay face down, [correctional officers] yellin’, man down, I thought I
12 was playin’ til I put my murder game down.” Tr. 7/28/08 at 102 (cleaned
13 up).
- 14 • “Will they have ski mask on plain aces. Give away clean or leave traces
15 and watch friends of Jason now led to acts of betrayal. Greed, jealousy
16 or lust always plays a factor in the homicide. Rolls over til the top blows
17 then don’t want the other man to be alive. Bullets get shot out the
18 weapon penetrate flesh when the body they inside -- then the body they
19 inside, making organs malfunction, shut down, then the body dies. Soul
20 gets snatched worn on the killer’s belt like a buckle.” Tr. 7/28/08 at 102.
- 21 • “Fuckin’ with the shit they use’n in the Middle East and East Africa,
22 Chinese made or Russian or Romainian made, hammer your brain like
23 eggs this is our brain on tumbers. Don’t hold my tongue for mar n****,
24 loud talker not me, mother fuckin’ mumblér Jas Coleon good with these
25 hands, a knock out artist grade A rumblér. I don’t fuck with suckers so
26 we could never be cool. You ain’t getting money or killin’ shit so I ain’t
27 feelin’ it.” Tr. 7/28/08 at 102-03.

- 1 • “I carry firearms for offense, not defense, locked and loaded. Chest cav-
2 ities explode with impact from projectiles.” Tr. 7/28/08 at 103 (cleaned
3 up).
- 4 • “Held accountable for your actions on disk a whole bunch of murder shit
5 you was rappin’. This whole mess you got to ask yourself how did it
6 happen. Now a hole in your chest, your thoughts, you’re graspin’. With
7 a hole in your chest your last breath you graspin’. Did you think that
8 vest was going to stop the shit that I up with. Sorry, pal guess you’re
9 wrong about the vest, you failed a physical challenge. Maybe the mortici-
10 cian can fix your face and make it look like you was smilin’. I’m smilin’
11 while relaxin’ in the Hawaii islands. Homicide cases investigators to me
12 try to tie in.” Tr. 7/28/08 at 103.
- 13 • “Thought it was just rap with this much money . . . N****s kill and die
14 for way less just progress.” Tr. 7/28/08 at 103.
- 15 • “At the funeral they gonna be singin’ goin’ up younger. The family know
16 why he dead, he fucked with the wrong n****. Ain’t no need for them to
17 wonder. The boy layin’ in a rented casket with a white tie. After the
18 service they gonna cremate the bastard. He’s fuckin’ headed and showed
19 up when it was time to shoot. He froze up and started shooting from a
20 distance. Shot in the face when he got close. He got his pretty ass pic-
21 ture printed in those dingy ass shirts and it’s gonna be a few more die’n
22 from that boy’s turf. You take this beef shit for real, it’s kill or be killed.”
23 Tr. 7/28/08 at 103-04.
- 24 • “Commit murders leavin’ no traceable evidence.” Tr. 7/28/08 at 104
25 (cleaned up).
- 26 • “Did I walk up and stand over, keep squeezing and the games over all of
27 this cause I was living life flashy. You’re a bitch sneakin’ up on me, but

1 I don't fuck for free. Try to prove how tough you be and you squeezed at
2 me, but you didn't kill a G. 7.26 308's and 223's, I'm stayin' with these.
3 Ain't playin' with these." Tr. 7/28/08 at 104 (cleaned up).

- 4 • "I possess in many arsenal and know how to organize murders motha
5 fucka, the last of a dying breed when you and the bitch got hit. The lung
6 damage made it hard to breath, the bullet in your spine made it hard to
7 walk." Tr. 7/28/08 at 104.

- 8 • "King of the Bay I represent my throne. This is more than music, it's
9 the way I do it. Thought it was just rap, now you got to face the music."
10 Tr. 7/28/08 at 136.

11 That last lyric was the last piece of testimony the jury heard in the liability phase of
12 the trial.

13 These lyrics featured prominently in the prosecution's closing argument. The
14 prosecution quoted three sets of lyrics at the very start of the initial closing argument.
15 Tr. 7/29/08 at 4. It quoted one of those sets of lyrics at the very end of the initial
16 closing argument. *Id.* at 26-27. And it referenced the lyrics yet again at the very end
17 of the rebuttal closing argument. *Id.* at 83-85.

18 The defense attorney provided deficient performance by failing secure a ruling
19 on the motion in limine and by failing to object to the introduction of these lyrics at
20 trial. The attorney correctly filed a motion in limine. While the court apparently
21 never definitively ruled on the motion (except potentially insofar as the lyrics ap-
22 peared in letters that Mr. Mathis sent to Ms. Carpenter), the court repeatedly sug-
23 gested the lyrics were irrelevant and therefore inadmissible. The attorney should've
24 ensured the court ruled on the motion in limine. In the alternative, the attorney
25 should've objected at the time of trial. During the post-conviction evidentiary hear-
26 ing, the attorney said he argued to keep out the rap lyrics and the court rejected the
27 argument. Tr. 4/23/19 at 24-30. To the contrary, it appears the court never explicitly

1 ruled on the motion, and indeed the court telegraphed its view that the lyrics were
2 irrelevant (except potentially to the extent they tied into Ms. Carpenter). As the at-
3 torney's testimony indicates, there was no strategic reason to avoid securing a ruling
4 or avoid objecting; rather, the attorney erroneously concluded the court had denied
5 the motion in limine and so erroneously failed to take those steps. Indeed, the Nevada
6 Supreme Court indicated in the post-conviction appeal that the attorney provided
7 deficient performance regarding this issue because most of the lyrics were irrelevant
8 (or because any probative value was outweighed by the danger of unfair prejudice).

9 The error was prejudicial. Had the attorney objected or insisted on a ruling,
10 and had the court responded reasonably, the court would've excluded the lyrics—as
11 it telegraphed it would. Had the court excluded the lyrics, there's a reasonable prob-
12 ability the jury would've reached a more favorable verdict. Indeed, the lyrics were
13 highly damaging other bad acts evidence that portrayed Mr. Mathis as a person with
14 a propensity toward violent behavior, and the jury received no limiting instruction
15 regarding the lyrics. Mr. Mathis is therefore entitled to relief.

16 **Ground Four: Mr. Mathis's attorney provided ineffective assis-**
17 **tance at the penalty phase of the trial, violating Mr. Mathis's**
18 **rights under the Fifth, Sixth, and Fourteenth Amendments to**
19 **the United States Constitution.**

20 **Statement regarding exhaustion:** Mr. Mathis litigated this claim or a sub-
21 stantially similar claim in his state post-conviction proceedings.

22 **Statement in support of claim:**

23 The right to effective assistance of counsel extends to a non-capital sentencing
24 or penalty phase. Here, Mr. Mathis's attorney expressed a total unwillingness to
25 participate meaningfully in the penalty phase. The error amounts to either ineffec-
26 tive assistance or a constructive denial of counsel. Mr. Mathis is entitled to a new
27 penalty phase.

1 If the jury convicts a defendant of first-degree murder in Nevada, the parties
2 have the right to a penalty phase on the first-degree murder charge, even in a non-
3 capital case. The parties can waive the penalty phase and have the court conduct the
4 sentencing, but the parties need to agree to waive the penalty phase.

5 The transcript of the penalty phase appears to begin mid-argument: the court
6 explains to the defense attorney that the prosecution is unwilling to waive the penalty
7 phase. Tr. 7/30/08 at 4. The defense attorney says, “[Y]ou can sentence him to the
8 max. . . . Go ahead and sentence him to the max.” *Id.* at 4. “I’m telling you you can
9 sentence him to the max. This is a waste of time.” *Id.* at 5. “It’s futile to have this.”
10 *Id.* “Whatever Your Honor chooses, whether it be the max or not, we are open to
11 having you sentence him to that.” *Id.* at 6. At that point, the attorney backtracked
12 slightly, suggesting he wasn’t offering to “stipulat[e] to the max.” *Id.* Then the at-
13 torney asked, “Can I have an associate sit in for me during this?” *Id.* The court
14 responded, “No.” *Id.* at 6. The attorney said, “It’s not going to matter. It doesn’t
15 matter.” *Id.* The court said, “You owe it to that man there to sit in here on this case.”
16 *Id.* The attorney said Mr. Mathis didn’t care, and the court again said no. *Id.* at 6-7.

17 The attorney continued to rant. “This is called being a sore winner. . . . A waste
18 of court time, taxpayer money, you name it across the board. Sentence him to the
19 max, Your Honor.” Tr. 7/30/08 at 7. Soon after, one of the prosecutors said the de-
20 fense attorney was calling the other prosecutor a “fat, sloppy fucker and a slob.” *Id.*
21 at 10. While the prosecutor was making that statement, the defense attorney said
22 “Slob.” The attorney then said, “You know. Walks like a duck, talks like a duck. . . .
23 The truth is an absolute defense to anything that is hurtful.” *Id.* The court admon-
24 ished the attorney to “act professional” because “the jury is coming in.” *Id.*

25 The defense attorney waived an opening statement. Tr. 7/30/08 at 11. He de-
26 clined to cross-examine the State’s first two witnesses. *Id.* at 17, 19. He conducted a
27 brief cross-examination of the third witness, the lead detective; the cross-examination

1 focused on Ms. Rowel. *Id.* at 40-46. He declined to cross-examine the State's fourth
2 witness. *Id.* at 49. The defense briefly called one witness, a defense investigator, to
3 discuss Ms. Rowel. *Id.* at 50-56. The defense presented no mitigation evidence what-
4 soever involving Mr. Mathis's character.

5 Mr. Mathis presented a disastrous allocution. He said he didn't know the vic-
6 tims, so he couldn't "express any remorse." Tr. 7/30/08 at 59. He said "these type of
7 things do happen within the streets." *Id.* The attorney asked him what he would do
8 with his life if the jury sentenced him to life with parole and he received parole.
9 Mr. Mathis answered, "I'm not going to do no 40 years. I'm going to get back on ap-
10 peal in close to five years." *Id.* at 60. "My mentality is like, excuse my language, I'm
11 like, fuck it, if you give me life without parole it's the same as 40, without life, or
12 whatever." *Id.* at 61. "[I]f you give me life without parole, my mentality is going to
13 be like, fuck it, excuse me, and if you give me 40 to life, my mentality is going to be
14 the same way." *Id.*

15 The defense presented a brief closing argument that barely exceeds a full tran-
16 script page. Tr. 7/30/08 at 66-68. The jury elected to impose life without parole. *Id.*
17 at 70-71.

18 The attorney testified at a state post-conviction hearing. He said he knew
19 Mr. Mathis was angry with the verdict, which was partly why they both wanted to
20 waive the penalty hearing; likewise, the attorney knew Mr. Mathis was likely to al-
21 ienate the jury during allocution and recommended against Mr. Mathis giving an
22 allocution. Tr. 4/23/19 at 30-34. The attorney couldn't say whether they discussed
23 the penalty phase before the liability phase started. *Id.* at 34-35. The attorney said
24 there wasn't much mitigation, and Mr. Mathis's mother refused to testify. *Id.* at 35,
25 39, 48. He admitted he began swearing at the prosecutor because the prosecutor
26 wouldn't waive the penalty hearing. *Id.* at 50-51.

1 The attorney provided deficient performance at the penalty phase—indeed, the
2 performance was so atrocious that it amounts to a constructive denial of counsel. The
3 attorney was belligerent on the record because the prosecutor wouldn't waive the
4 penalty phase. The attorney repeatedly suggested he would stipulate to the maxi-
5 mum sentence; at one point, he appeared to walk that offer back, then he made it
6 again. He asked if he could leave and have an associate fill in for him. As his state-
7 ments indicate, he was completely disinterested in and unwilling to conduct a penalty
8 phase. His attitude showed in his performance. He waived an opening statement.
9 He chose to cross-examine only one of the four State's witnesses and called only one
10 witness of his own. The testimony he elicited from these two witnesses was focused
11 solely on Ms. Rowel and had nothing to do with Mr. Mathis directly. He presented
12 no evidence whatsoever about Mr. Mathis's character, upbringing, or any other rele-
13 vant mitigation topics. He failed to prepare Mr. Mathis to provide an appropriate
14 allocution, and Mr. Mathis's allocution was utterly disastrous. He provided a weak
15 and brief closing argument. His conduct during the penalty phase failed to come
16 anywhere close to professional representation.

17 The error was prejudicial. The attorney's performance was so poor that it
18 amounted to a constructive denial of counsel, so the Court should presume prejudice.
19 In the alternative, it's reasonably probable that if the attorney provided a competent
20 mitigation presentation at sentencing, the jury would've reached a more favorable
21 penalty verdict. Mr. Mathis is entitled to a new penalty phase.
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1 **Ground Five: The State failed to disclose impeachment material**
 2 **regarding Inspector Robert McMillan, violating Mr. Mathis’s**
 3 **rights under the Fifth, Sixth, and Fourteenth Amendments to**
 4 **the United States Constitution.**

5 **Statement regarding exhaustion:** Mr. Mathis hasn’t fairly presented this
 6 claim in state court.

7 **Statement in support of claim:**

8 Mr. Mathis maintains—on information and belief—that the State failed to dis-
 9 close material impeachment information regarding Inspector Robert McMillan. *See*
 10 *Brady v. Maryland*, 373 U.S. 83 (1963).

11 Inspector McMillan was a significant witness at trial. Among other things,
 12 and as Grounds One and Three(A) explain, Inspector McMillan provided the founda-
 13 tion for admitting Ms. Rowel’s alleged statement to the effect that Mr. Mathis had
 14 told her he committed the murders.

15 Inspector McMillan has a checkered record. One prominent example involves
 16 the wrongful conviction of Jamal Trulove for the murder of Seu Kuka in July 2007
 17 (which occurred while Mr. Mathis’s case was pending trial). The victim was shot on
 18 a sidewalk outside a housing project in San Francisco. The police conducted two
 19 photo lineups with an eyewitness, Priscilla Lualeмага. In the first lineup, she failed
 20 to identify Mr. Trulove. *Trulove v. D’Amico*, No. 16-cv-050-YGR, 2018 WL 1070899,
 21 at *1 (N.D. Cal. Feb. 27, 2018). During that lineup, one of the officers pointed to the
 22 photo of Mr. Trulove and asked her if she was sure it wasn’t him; she said she didn’t
 23 know. *Id.* at *2. In the second lineup, she identified Mr. Trulove as a potential sus-
 24 pect. *Id.*

25 Ten months after the murder, in June 2008 (just before Mr. Mathis’s trial),
 26 Inspector McMillan and another officer conducted a traffic stop of Latisha Meadows
 27 and arrested her for possession of drugs and a stolen gun. *See Trulove*, 2018 WL
 1070899, at *2. She claimed she’d witnessed the murder and gave a statement to

1 Inspector McMillan and another officer. *Id.* Some of the details were consistent with
2 Ms. Lualemaga’s statement, but other details were inconsistent with known facts
3 about the murder. *Id.* The police showed her a lineup, and she identified Mr. Trulove.
4 *Id.* The police then released her and declined to pursue charges against her. *Id.*

5 A couple months after Inspector McMillan spoke with Ms. Meadows, the state
6 of California decided to prosecute Mr. Trulove for the murder. *See Trulove*, 2018 WL
7 1070899, at *3. A jury convicted him, but a state appellate court reversed. *Id.* At a
8 retrial, the jury acquitted Mr. Trulove. *Id.* He then filed a federal civil rights lawsuit
9 against the police for the wrongful conviction. Inspector McMillan was one of the co-
10 defendants.

11 The federal district court denied Inspector McMillan’s and most of the other
12 co-defendants’ motions for summary judgment and their corresponding requests for
13 qualified immunity. It found there were sufficient triable issues of fact involving
14 Mr. Trulove’s claim that Inspector McMillan deliberately or recklessly fabricated ev-
15 idence. A reasonable jury could conclude Inspector McMillan “knew, or recklessly
16 disregarded, the falsity of Latisha Meadows’ identification of [Mr. Trulove] as the
17 shooter.” *Trulove*, 2018 WL 1070899, at *5. “The evidence of coercive circumstances
18 and reckless disregard of the falsity of Meadows’ statement—the circumstances un-
19 der which it was obtained, the inconsistencies with the known facts, and the details
20 omitted from the officers’ reports—is, standing on its own, sufficient to permit a rea-
21 sonable jury to find that McMillan . . . knew, or [was] deliberately indifferent to those
22 circumstances yielding false information.” *Id.*

23 The court also concluded there were sufficient triable issues of fact involving
24 Mr. Trulove’s claim that Inspector McMillan deliberately or recklessly failed to dis-
25 close exculpatory evidence. A reasonable jury could conclude Inspector McMillan and
26 other officers “failed to disclose exculpatory evidence concerning the circumstances
27

1 under which the eyewitness identifications and statements were obtained.” *Trulove*,
2 2018 WL 1070899, at *6.

3 For similar reasons, the court found triable issues of fact involving
4 Mr. Trulove’s corresponding malicious prosecution and conspiracy claims. *Id.* at
5 *Trulove*, 2018 WL 1070899, at *8-*9.

6 The case proceeded to trial. The jury returned a verdict in favor of Mr. Trulove
7 as to two co-defendants (but not Inspector McMillan). *See Trulove v. San Francisco*,
8 No. 16-cv-050-YGR, 2018 WL 3429113, at *1, *4 n. 2 (N.D. Cal. July 16, 2018).

9 Separately, the San Francisco District Attorney’s office sent a letter to defense
10 attorneys on September 23, 2011, acknowledging that Inspector McMillan “has ma-
11 terial in his personnel file . . . that may be subject to disclosure under *Brady*.” PEx.
12 3. Assuming this *Brady* material existed at the time of Mr. Mathis’s July 2008 trial,
13 it should’ve been disclosed to the defense beforehand.

14 Mr. Trulove’s case and the San Francisco DA’s letter both provide Mr. Mathis
15 with a good faith basis to allege on information and belief that additional impeach-
16 ment information exists involving Inspector McMillan and his potential misconduct
17 leading up to the time of Mr. Mathis’s trial. Mr. Mathis is filing a corresponding
18 discovery motion seeking to subpoena relevant entities (such as the San Francisco
19 Police Department) for potential impeachment information involving Inspector
20 McMillan. The Court should grant the discovery motion. If the discovery process
21 leads to impeachment information involving Inspector McMillan, Mr. Mathis would
22 likely seek leave to amend this petition to include this information in this claim for
23 relief.

24 Assuming such impeachment information exists, the State was in constructive
25 possession of the information and failed to disclose it to the defense before trial. The
26 information was material. As Grounds One and Three(A) explain, Inspector McMil-
27 lan was an important witness: notably, he laid the foundation for Ms. Rowel’s alleged

1 statement that Mr. Mathis made incriminating statements to her. Had the jury
2 learned about potential impeachment information involving Inspector McMillan, the
3 jury would've likely drawn adverse credibility determinations regarding his testi-
4 mony. In turn, there's a reasonable probability the jury would've reached a more
5 favorable verdict. Assuming the impeachment information exists, Mr. Mathis would
6 be entitled to a new trial.

7 **PRAYER FOR RELIEF**

8 Accordingly, Mr. Mathis respectfully requests this Court:

- 9 1. Issue a writ of habeas corpus to have Mr. Mathis brought before the
10 Court so he may be discharged from his unconstitutional confinement;
11 2. Conduct an evidentiary hearing at which proof may be offered concern-
12 ing the allegations in this amended petition and any defenses that may be raised by
13 the State; and
14 3. Grant such other and further relief as, in the interests of justice, may be
15 appropriate.

16 **DECLARATION UNDER PENALTY OF PERJURY**

17 I declare under penalty of perjury under the laws of the United States of Amer-
18 ica and the State of Nevada the facts alleged in this petition are true and correct to
19 the best of my knowledge, information, and belief.

20
21 Dated October 13, 2023.

22 Respectfully submitted,

23 Rene L. Valladares
24 Federal Public Defender

25 /s/ Jeremy C. Baron

26 Jeremy C. Baron
27 Assistant Federal Public Defender